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6 Attorneys for United States of America

7 **IN THE UNITED STATES DISTRICT COURT FOR THE**  
 8 **NORTHERN DISTRICT OF CALIFORNIA**  
 9 **SAN FRANCISCO DIVISION**

10 **RICHARD GEORGE,** )  
 11 Plaintiff, ) **NO. C-07-4673-MJJ**  
 12 v. )  
 13 **UNITED STATES OF AMERICA,** ) **MEMORANDUM IN OPPOSITION**  
 14 Defendants. ) **TO RICHARD GEORGE'S MOTION FOR**  
 15 ) **DEFAULT FINAL JUDGMENT**  
 \_\_\_\_\_ )  
 ) **DATE: MARCH 4, 2008**  
 ) **TIME: 9:30 a.m.**  
 ) **PLACE: Courtroom 11, 19th Floor**

16 The United States of America, by its undersigned counsel, submits this memorandum in  
 17 opposition to plaintiff's motion for default judgment.

18 **QUESTION PRESENTED**

19 Whether default judgment should be entered against the United States of America pursuant to  
 20 Rule 55 of the Federal Rules of Civil Procedure.

21 **STATEMENT OF THE CASE**

22 The plaintiff's Complaint in this matter was filed on September 7, 2007 in the Superior Court  
 23 of the State of California in and for the County of San Mateo. A copy of the Complaint was received  
 24 by the Office of the United States Attorney for the Northern District of California on September 10,  
 25 2007. The United States filed a Petition for Removal of Civil Action from San Mateo Superior Court  
 26 to the United States District Court for the Northern District of California on September 11, 2007. The  
 27 United States did not timely file an Answer with the Court, but did subsequently filed a Motion to  
 28 Dismiss with the Court on January 15, 2008.

1 Plaintiff filed a Motion for Default Judgment with the Court on January 15, 2008, after the  
 2 United States had already filed its Motion to Dismiss. No default judgment has been entered against  
 3 the United States under Rule 55(e).

4 ARGUMENT

5 I

6 DEFAULT JUDGMENT SHOULD NOT BE ENTERED AGAINST THE UNITED STATES.

7 Rule 55(e) of the Federal Rules of Civil Procedure provides in pertinent part that "[n]o  
 8 judgment by default shall be entered against the United States or an officer or agency thereof unless the  
 9 claimant establishes his claim or right to relief by evidence satisfactory to the court." Thus, the  
 10 standard for default against the United States is stricter than against non-government defendants. See  
 11 Federal Rules of Civil Procedure 55(a). This rule precludes the entry of default against the United  
 12 States simply because the response is not filed on the date required. Giampaoli v. Califano, 628 F.2d  
 13 1190, 1193-1194 (9th Cir. 1980). Mere failure to respond to the complaint within the proscribed  
 14 period does not justify entry of default judgment. See Ross v. United States, 574 F.Supp. 536, 538  
 15 (S.D.N.Y. 1983); United States v. Zulli, 418 F.Supp. 252 (E.D. Pa. 1976); Greenbaum v.  
 16 United States, 360 F.Supp. 784 (E.D. Pa. 1973). Moreover, default is especially inappropriate when  
 17 the government responds to the complaint by answer or motion soon thereafter. Ross v. United States,  
 18 574 F.Supp. at 538 (citing 6 J. Moore, Moore's Federal Practice § 55.12 at 55-321 to 55-322 (1982)).

19 In the instant action, the plaintiff bases his Motion for Default Judgment on the grounds that the  
 20 United States has failed to answer or otherwise defend within the time required under the Federal Rules  
 21 of Civil Procedure. Contrary to plaintiff's position, however, the United States filed its Motion to  
 22 Dismiss with the Court in response to plaintiff's Complaint prior to the plaintiff's filing of his Motion  
 23 for Default Judgment. Thus, the plaintiff has not presented any evidence which establishes his claim or  
 24 right to relief as required by Federal Rules of Civil Procedure 55(e).

25 Mere failure to timely file an answer on the part of the United States is no ground for entry of  
 26 judgment against it. The plaintiff must establish his claim, satisfy the Court as to the waiver of  
 27 sovereign immunity and make proper service on the United States before judgment may be entered  
 28 against the United States because of its failure to appear. Fedor v. Ribicoff, 211 F.Supp. 520 (E.D. Pa.

1 1962). In Rank v. Krug, 142 F.Supp. 1 (S.D. Cal. 1956) it was held that the introduction and  
2 supplementation of evidence at the reopened trial was compliance with Rule 55(e) requiring that  
3 default judgment against United States be sustained by evidence.

4 In the instant action, the plaintiff has not presented evidence which establishes, his claim, right  
5 to relief, or waiver of sovereign immunity as required by Federal Rules of Civil Procedure 55(e).  
6 Accordingly the motion for default judgment should not be granted.

7 CONCLUSION

8 For the reasons set forth above, the United States respectfully moves that this Court enter an  
9 Order denying plaintiff's motion for default judgment.

10 Respectfully submitted,

11 JOSEPH RUSSONIELLO  
United States Attorney

12  
13 /s/ Thomas Moore  
14 THOMAS MOORE  
15 Assistant United States Attorney  
16 Tax Division  
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**CERTIFICATE OF SERVICE**

1 I, KATHY TAT declare:

2 That I am a citizen of the United States of America and employed in San Francisco County,  
 3 California; that my business address is Office of United States Attorney, 450 Golden Gate Avenue,  
 4 Box 36055, San Francisco, California 94102; that I am over the age of eighteen years, and am not a  
 5 party to the above-entitled action.

6 I am employed by the United States Attorney for the Northern District of California and  
 7 discretion to be competent to serve papers. The undersigned further certifies that I caused a copy of the  
 8 following:

9 **MEMORANDUM IN OPPOSITION TO RICHARD GEORGE'S MOTION FOR DEFAULT  
 10 FINAL JUDGMENT**

11 to be served this date upon the party(ies) in this action by placing a true copy thereof in a sealed  
 12 envelope, and served as follows:

13  FIRST CLASS MAIL by placing such envelope(s) with postage thereon fully prepaid in the  
 14 designated area for outgoing U.S. mail in accordance with this office's practice.

15 **PERSONAL SERVICE (BY MESSENGER/HAND DELIVERED)**

16 **FACSIMILE (FAX) No.:** \_\_\_\_\_

17 to the parties addressed as follows:

18 Richard George  
 19 431 Central Ave.  
 Menlo Park, CA 94025

20 I declare under penalty of perjury under the laws of the United States that the foregoing is true  
 21 and correct.

22 Executed on February 12, 2008 at San Francisco, California.

23  
 24  
 25 \_\_\_\_\_ /s/ Kathy Tat  
 26 KATHY TAT  
 Legal Assistant  
 27  
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